



POLICE DEPARTMENT CITY OF NEW YORK

April 29, 2016

MEMORANDUM FOR: Police Commissioner

Sergeant Christopher Pasquale
Tax Registry No. 927322
Intel-Criminal Intel Section
Disciplinary Case No. 2015-13176

Police Officer Michael Balicki
Tax Registry No. 932291
41 Precinct
Disciplinary Case No. 2015-13174

Charges and Specifications:

Disciplinary Case No. 2015-13176

1. Said Sergeant Christopher Pasquale, on or about September 6, 2013 at approximately 19:30 hours, while assigned to the 41st Precinct and on duty, in the vicinity of [REDACTED], Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he threatened to damage the property of MARIA MARRERO without sufficient legal authority, by stating in sum and substance, "WE WILL COME IN LIKE GANGSTERS, WE WILL BREAK DOWN THE DOOR."

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED
CONDUCT

Disciplinary Case No. 2015-13174

1. Said Police Officer Michael Balicki, on or about September 6, 2013 at approximately 19:30 hours, while assigned to the 41st Precinct and on duty, in the vicinity [REDACTED] Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he entered the apartment of MARIA MARRERO without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED
CONDUCT

Appearances:

For CCRB-APU: Suzanne O'Hare, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For Respondent Pasquale: Matthew Schieffer, Esq.
The Quinn Law Firm
399 Knollwood Road, Suite 220
White Plains, NY 10603

For Respondent Balicki: Craig Hayes, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

Hearing Date:
January 27, 2016

Decision:
Not Guilty

Trial Commissioner:
ADCT Paul M. Gamble

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on January 27, 2016. Respondents, through their respective counsel, entered pleas of Not Guilty to the subject charges. CCRB called Maria Marrero and Brian Shepard as witnesses. Respondents called Inspector Philip Rivera as a witness and testified on their own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondents Not Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

The following is a summary of the relevant facts.

On September 6, 2013, Respondent Pasquale and Respondent Balicki knocked on the door to [REDACTED], Bronx, New York, following a lead in a pattern-robbery investigation (T. 86). Prior to that date, Respondent Pasquale had been made aware of two robberies which occurred in the 41st Precinct, both involving Craigslist advertisements for the sale of a motorcycle. In both instances, when individuals responded to the advertisement and went to [REDACTED] to complete the sale, they were robbed at gunpoint in the stairwell by several individuals who then fled up the stairs toward the roof. During the course of his investigation, Respondent Pasquale learned that [REDACTED] was located directly behind [REDACTED] with roof access between the two buildings. Person A became a suspect in the robberies after being identified by two victims in a photo identification procedure. Furthermore, Respondent Pasquale developed information suggesting that Person A had a connection to [REDACTED] (Id.). Respondent Pasquale's intention that day was to determine whether Person A was present in the apartment. If Person A was present, Respondent would seek to arrest him for the robberies; if not, then he would attempt to learn Person A's whereabouts from the residents of the apartment (T. 86, 91).

Respondent Pasquale knocked on the door to the apartment, announcing his presence as "Police." A male voice inside the apartment responded by asking Respondent Pasquale whether he had a search warrant. Respond Pasquale replied that he did not. The male voice began reciting parts of the United States Constitution and told Respondent Pasquale to leave (T. 87).

Respondents waited in the hallway for approximately 20-30 minutes, then saw a pizza delivery person approach Apartment [REDACTED]. The delivery person knocked on the door but received

no response. The delivery person then called a telephone number which corresponded to the order. Respondent Pasquale was able to hear a telephone ringing inside Apartment [REDACTED]. After conferring with the delivery person, Respondent Pasquale observed that the telephone number corresponding to the person ordering the pizza was the same number which had been used in the Craigslist advertisements. The delivery person did not receive a response to his telephone call. At that point, Respondent Pasquale contacted the Commanding Officer of the 41st Precinct, then-Deputy Inspector Philip Rivera, briefed him on the status of the investigation and advised him that Respondent intended to make an application for a search warrant for the apartment. Respondent Pasquale detailed several officers to cover the roof of the building and fire escape routes while he awaited Rivera's arrival (T. 87-88).

Sometime after Rivera's arrival at the scene, Person A and Respondent Pasquale had a telephone conversation in which Person A expressed his intention to surrender but requested assurances that he would not be harmed. Respondent Pasquale assured him that the 41st Precinct Commanding Officer was present and would ensure that his surrender would be handled appropriately. The door to the apartment opened, Person A exited and surrendered with his hands up. He was handcuffed and transported to the 41st Precinct (T. 89).

Respondents Pasquale and Balicki went to the door after Person A exited the apartment and began a conversation with Person B. Respondent Pasquale informed [REDACTED] that Person A had been positively identified by two witnesses and that both robberies involved the use of a firearm. Respondent Pasquale asked [REDACTED] for consent to search the apartment for the cell phone and firearm Person A used in the robberies, as well as for proceeds of the robberies. Respondent Pasquale further informed [REDACTED] that in the event she did not consent to the search, he would seek a search warrant, which he was confident of receiving, and that the

Emergency Services Unit ("ESU") would effect a forced entry of the apartment (T. 90-92).

██████ refused to consent, attempted to close the door but Respondent Balicki prevented the door from closing while he attempted to continue the conversation. While the door was open, Respondent Balicki shined a flashlight inside the apartment through the doorway. Eventually, Respondent Balicki removed his foot from the door and ██████ closed it.

Once ██████ closed the apartment door, Respondent Pasquale stationed police personnel in front of the door and around the building to secure it, then began the search warrant application process. The next day, Respondent Balicki applied for and received a search warrant for the premises, which was executed that same day (T. 92).

The issues in this case are: (1) whether Respondent Pasquale threatened to damage Maria Marrero's property by stating, "We will come in like gangsters, we will break down the door"; and (2) whether Respondent Balicki entered Maria Marrero's apartment without sufficient authority.

Marrero testified that Respondents knocked on her door without identifying themselves as police officers and asked her to open the door. Marrero refused on the advice of her attorney. Respondents continued banging on the door for approximately 20 minutes, then started calling different telephone numbers in an attempt to speak with the occupants of the apartment. Marrero overheard someone she identified as "the captain" on Person A's phone threatening to "come in like gangsters" if they did not open the door. Person A eventually opened the door and surrendered but Respondent Balicki placed his foot in the doorway when Person B attempted to close the apartment door.

Respondent Pasquale testified that he pursued a pattern robbery investigation until it led him to ████████████████████, where he believed one of the perpetrators, Person A,

could be present. Respondent Pasquale attempted to speak to Person A unsuccessfully but developed further evidence during his time outside the apartment which confirmed his earlier suspicion that Person A was involved in the robberies. Respondent Pasquale persisted in attempting to get Person A to surrender, eventually enlisting the aid of the precinct Commanding Officer.

Having considered the testimony, evidence and arguments put forth by the parties, I find: (1) Respondent Pasquale did not threaten to damage Maria Marrero's property; and (2) Respondent Balicki did not enter Maria Marrero's apartment without sufficient legal authority. What follows is a summary of the evidence presented by the parties which is relevant to the disputed facts.

Maria Marrero testified that she is a 47-year old [REDACTED] customer service representative and has been with that company for 17 years (Transcript "T" 11). Marrero testified further that she resides in [REDACTED] and has resided there continuously for 12 years (T. 12). On September 6, 2013, Marrero resided there with her two daughters Persons B and C, her son Person D; and a minor child, Minor 1 (Id.).

On September 6, 2013, at about 1800 hours, Marrero returned home from work and found the other four occupants of her apartment present, as well as Brian Shepard and Person A. Shepard and Person A both lived at [REDACTED] in the Bronx (T. 13). At approximately 1900 hours, Marrero heard banging on her apartment door, accompanied by a voice which said, "Open the fucking door" (T. 14). When she looked through her peephole, Marrero saw only a gold badge (Id.). Marrero answered, "What is it; what's happening?" (Id.). The voice outside the door repeated, "Open the fucking door" (Id.). Marrero testified that she

contacted her attorney who advised her against opening the door unless the persons banging on the door identified themselves (T. 14-15). The banging continued for approximately 20 minutes then stopped (Id.).

Marrero testified that after about 20 minutes, the banging resumed (Id.). Again, she went to the door and asked, "What is it?" and was told to "open the door" (Id.). Marrero refused but then heard someone say "Person A" (Id.). Marrero asked, "Person A?" to which the voice responded, "We want to speak to Person A" (Id.). Marrero went inside her son's bedroom where Person A was and told him that his name was mentioned by the people outside the door (T. 16). According to Marrero, he became very quiet and did not respond to her (Id.). At that point, the house phone, Marrero's cell phone and Person A's cell phone began to ring (Id.). Marrero answered her phone and was addressed by a person who identified himself as "a Captain" and asked to speak to her inside (Id.). Marrero replied that any conversation would take place over the phone (Id.). After a period of silence, the "Captain" ended the call (Id.). Marrero testified that Person A's phone then rang and he answered it, placing the call on speaker (Id.). Marrero testified that after hearing the voice on the phone, she recognized it as belonging to the person to whom she had just spoken, and who had previously identified himself as "the Captain" (Id.). Person A asked, "What do you want to talk about?" (T. 17.). The voice said, "For you to come to the door. We would like to speak to you. Can we go into the home?" (Id.) Person A replied that they could not and ended the call (Id.).

Marrero testified that Person A's phone rang again and he answered it, speaking with "the Captain" on speaker (Id.). Person A then said, "I'm going to stop this madness. I'm going to give myself in. I'm afraid because police officers hit kids," to which the voice on the phone responded, "We'll come in like gangsters and break the door down" (T. 17, 35, 55). After that

conversation, Person A walked to the apartment door with Person B, Shepard and Person D (T. 17-18). Marrero remained in her son's room, from which she said she could see the front door of her apartment (Id.). Marrero testified that she saw Person A leave the apartment and heard the police officers tell him, "Don't try no judo" (T. 19). Person A replied, "I'm not going to try no judo. I'm looking at your badges" (Id.).

Marrero testified that she heard Person B saying, "You can't do that; that's illegal. Let me close the door; Person A gave himself in" (T. 20). Marrero observed Respondent Balicki at the front door with his foot between the door and the doorframe (Id.). Marrero testified that she observed Respondent Balicki shine a flashlight inside the apartment and state, "I'm looking to see if there's a gun so they don't shoot me (T. 20-21). Marrero testified that she heard Person B ask Respondent Balicki to move his feet four times over a period of three minutes before he moved his foot and Person B closed the apartment door (T. 25).

Marrero conceded on cross-examination that while she testified at trial that Respondents had not identified themselves as police officers when they first knocked on her door, she made a statement to CCRB in which she stated that they had identified themselves right away (T. 28).

Brian Shepard testified that he was a 20-year old unemployed grounds technician who resided at [REDACTED] in the Bronx (T. 66). Shepard testified that he was a friend of the Marrero family and was present in Apartment [REDACTED] on September 6, 2013 (T. 67). Shepard and Person D had spent approximately 20 minutes together at Shepard's grandmother's home before returning to Marrero's apartment at approximately 1700 hours (T. 68). When Shepard arrived at the apartment, he saw Person A, Person B, Person C and Minor¹, (T. 69). According to Shepard, Marrero arrived at the apartment at approximately 1900 hours (Id.).

¹ The tribunal finds that "Person A" is Person A.

At approximately 1810 hours, Shepard heard knocking at the door to the apartment (Id.). Person A went to the door and asked who it was but received no response (Id.). Person A looked through the peephole and saw a badge (T. 70). The knocking continued for about five minutes then stopped (Id.). Marrero returned home from work soon thereafter but the knocking resumed shortly after her arrival (Id.). When the knocking resumed, Shepard, Person D and Person A went to the door (Id.). The persons knocking on the door said, "Person A, we know you're in there; come out" (T. 71). Shepard testified that he, Person D and Person A then went to Person D's room to listen to music (Id.).

Shepard testified that the house phone, then Marrero's cell phone and finally A's cell phone began to ring (Id.). Pers.A answered his phone and began a conversation with "a Captain or a Sergeant" who identified himself before Pers.A put the call on speaker. After being placed on speaker, Shepard heard the voice say "We will break into the house the gangster way if you don't let us in" (Id.). Pers.A told the caller, "That would violate the Fourth Amendment," after which the call ended (T. 72-73). Shepard later conceded on cross-examination that he never heard the caller identify himself (T. 81).

Marrero then entered the room, took Person A aside and had a conversation with him which Shepard did not hear (T. 73). Shortly thereafter, Person A returned to Person D's room and said he was thinking about turning himself in (Id.). Person A called "the Sergeant or Captain" back and told him that he was going to surrender (Id.). Person A walked to the apartment door with Person B, Person D and Shepard (Id.). Shepard observed Person A open the apartment door and walk into the hallway with his hands up (Id.). Shepard observed several police officers in the

hallway, including Respondent Balicki who stuck his foot in the doorway to prevent the door from closing² (Id.).

Shepard testified that Respondent Balicki took a flashlight from his belt and shined it inside the apartment (T. 77). Person B objected stating, "You don't have a warrant, you can't do that" (Id.). Shepard testified that Respondent Balicki said he had to do it to make sure there wasn't someone inside the apartment with a gun trying to shoot him (Id.). Person B and Respondent Balicki began to argue for about five minutes before he removed his foot from the door and Person B closed it (Id.).

Respondent Pasquale testified on cross-examination that he never had a telephone conversation with Marrero (T. 97). Respondent Pasquale stated that while he attempted to initiate a call with Person A unsuccessfully, it was only when Person A called back that Pasquale spoke with him (Id.). In that conversation, Person A expressed his desire to surrender some two to three hours after Respondent Pasquale initially appeared at the apartment (Id.). Respondent Pasquale testified that only after Person A acknowledged that he was inside Apartment [REDACTED] and that he was coming out to surrender was he sure that Person A was physically present inside the apartment (Id.). Respondent Pasquale denied ever telling Person A, "If you don't let us in, we'll come in like gangsters and break down the door" (T. 98). Respondent Pasquale testified that his first priority was to arrest Person A, as he was suspected of committing a violent felony (Id.). As a secondary matter, Respondent Pasquale wanted to search the apartment but never had a discussion with Person A concerning consent because Person A, based upon his investigation to that point, did not reside in the apartment (Id.). Respondent Pasquale testified that he had a conversation with Person B at the door to the apartment in which he explained her options to

² Shepard was unable to identify Respondent Balicki in court.

her, and sought her consent to search the apartment (T. 100-101). Person B did not immediately reject the request but after a time did so (T. 101). Respondent Pasquale informed Person B that if she did not consent, that he would enter the apartment at some point but offered to spare her "the inconvenience of having the door damaged and everybody handcuffed. So I explained to her possibly – potentially a better option for herself and her family" (T. 101-102).

Inspector Rivera testified that on September 6, 2013, he was the Commanding Officer of the 41st Precinct in the Bronx and held the rank of Deputy Inspector at the time of the incident (T. 108). Rivera testified that at about 1930 hours, he responded to [REDACTED] [REDACTED], at the request of Respondent Pasquale, who was his Field Intelligence Officer (T. 109). Respondent Pasquale had informed him that he had confirmed that Person A, a suspect in two gunpoint robberies, had been located inside [REDACTED] (Id.). Person A later expressed concerns about his safety and Respondent Pasquale engaged Rivera to explore whether his presence on scene might be sufficient assurance to Person A that he would not be mistreated (Id.). Once Rivera arrived on scene, Respondent Pasquale informed Person A of his arrival and Person A surrendered (Id.).

Subsequent to Person A's surrender, Rivera observed a conversation between Person B and Respondent Pasquale at the door to the apartment (T. 110). In this conversation, Rivera heard Respondent Pasquale inform Person B that he was concerned about evidence relating to two gunpoint robberies being inside the apartment, including the possibility of a firearm, and that he would like her consent to search the apartment (Id.). When Person B did not accede to Respondent Pasquale's request, he informed her that he would be making an application for a search warrant, based upon the information in his possession, and that they would return to the location with a tactical team to effect a forced entry (T. 111). Rivera testified that such an entry

would result in anyone in the apartment being handcuffed while the entry team looked for weapons and additional suspects (Id.).

Despite Respondent Pasquale's entreaty, Person B did not consent and eventually closed the door to the apartment (Id.). Rivera, after consultation with Respondent Pasquale, ordered the apartment secured with two officers at the front door; two officers on the roof; and two officers watching the fire escape below the apartment (Id.). Rivera and Respondent Pasquale left the scene with the understanding that Respondent Pasquale would make an application for a search warrant the next morning (Id.).

On cross-examination, Rivera was asked whether Respondent Pasquale had told Person B "If you don't let us in, we're going to have to break the door; we'll come in like gangsters"; Rivera responded, "He did not say that" (T. 114). When asked whether Respondent Pasquale had said, "We'll have to break the door," Rivera replied that Pasquale had said that they would "have to do a tactical entry [and that] ESU would force the door open" (Id.).

Respondent Balicki testified that he was present at the door to Apartment 5-H with Respondent Pasquale after Person A emerged from the apartment and surrendered (T. 130). Respondents Balicki and Pasquale attempted to begin a dialogue with Person B which both officers hoped would result in her granting consent to search the apartment (T. 131-132).

As Respondent Balicki and Respondent Pasquale stood at the door, Person B attempted to close the door and Respondent Balicki inserted his foot in the doorway to prevent the door from closing (T. 130). Respondent Balicki testified that he took this action because he observed movement inside the apartment behind Person B (Id.). Respondent Balicki testified further that the inside of the apartment was dimly lit, and he saw what appeared to be people ducking down behind a couch inside the living room, which was the room an observer from the hallway would

see when looking into the apartment (Id.). Respondent Balicki testified that he used a flashlight, which he shined into the apartment, to assist him in determining whether the individuals inside represented a threat to either himself or his fellow officers (Id.). Respondent Balicki testified that, based upon what he knew at that time, namely, that Person A had just surrendered after being wanted for two armed robberies, there were un-apprehended suspects whose whereabouts were unknown, and that a firearm used in the robbery had not yet been recovered, he was concerned about the possibility of someone inside the apartment using the firearm in an unlawful manner (T. 131). Respondent Balicki testified that he expressed these concerns to Person B when she questioned him as to why he had his foot in the doorway (T. 130-131).

1. Threat to Damage Property

Based upon the credible evidence in the record, I find that there is insufficient evidence to prove that Respondent Pasquale threatened to damage Marrero's property; accordingly, I find him Not Guilty of that specification. I credit the testimony of both Respondents as forthright, consistent and logical. Their credibility was buttressed by the testimony of Inspector Rivera, whose testimony not only provided context to this case but whose trial demeanor was exemplary.

I do not credit the testimonies of Marrero and Shepard, as they each embellished facts in a gratuitous manner which neither added nor detracted from their respective positions in the case but which nonetheless served to undermine their credibility.

At the outset, Marrero's assertion that Respondents continued banging on her door without identifying themselves is implausible. If Respondents' goal was to engage with the residents of the apartment in order to either arrest Person A or learn his whereabouts, being coy about their identity would not serve that end. Common sense suggests that a person would be

more likely to refuse to answer the door for an unexpected guest than ignore the police on official business.

Marrero's assertion that Respondent Pasquale threatened to break her door down by "coming in like gangsters" is unsupported by the other facts in the case. She was only able to identify a voice she claimed to have heard over Person A's telephone. While I credit her testimony that she remained in the background and allowed her daughter Person B to deal with Respondents, her rendition of events is nonetheless self-serving, evincing a willingness to shade her testimony to distance herself from Person A and his involvement in a violent crime.

Shepard's willingness to embellish his testimony with the gratuitous assertion that Respondents slapped Person A in the head in the presence of their Commanding Officer renders his testimony unreliable.

Respondent Pasquale testified credibly that he sought [REDACTED]'s consent to search the apartment for instrumentalities and proceeds of the crime. Based upon the facts known to Respondent Pasquale at the time immediately following Person A's surrender, I find his belief that he had sufficient cause to obtain a search warrant to be reasonable. I further find that Respondent Pasquale made a factual assertion to Person B which was corroborated by Inspector Rivera and which is demonstrably true: namely, that ESU, in supporting the execution of a search warrant, effects a forcible entry into a premise, which invariably necessitates breaching the portal to the subject premise.

Furthermore, I give significant weight to Inspector Rivera's unequivocal assertion that Respondent Pasquale never issued a threat. Based upon knowledge of the functioning of a quasi-military organization, it is unlikely that Respondent Pasquale, had he intended to coerce

Person B into giving consent, would have called his Commanding Officer to the scene to be a first-hand witness to his misconduct.

Based upon the foregoing, I find Respondent Pasquale Not Guilty.

2. *Unlawful Entry*

Based upon the credible evidence in the record, I find insufficient evidence to prove that Respondent Balicki entered Marrero's apartment without sufficient legal authority; accordingly, I find him Not Guilty of this specification.

It is not in issue that Person A was placed under arrest for two gunpoint robberies after emerging from inside [REDACTED]. Person A was connected to the robberies by: (1) photo identification by victims of the robberies; (2) the use of the same telephone number included in the Craigslist advertisement as the order for pizza, delivered to [REDACTED] where he was present. Based upon the foregoing, there was probable cause to arrest him. Inasmuch as Person A voluntarily left [REDACTED] and surrendered to the police, there was no violation of the *Payton* rule (see *Payton v. New York*, 445 US 573, 590 [1979][absent exigent circumstances, a warrantless arrest inside a suspect's residence is unreasonable]).

"A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person may be hiding" (*Maryland v. Buie*, 494 US 325, 327 [1990]; *People v Harper*, 100 AD3d 772, 774). Furthermore, an officer attempting to conduct such a post-arrest sweep must "possess a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted' the officer in believing" that the area swept harbored an individual posing a danger to the officer or others (*Id.*).

In this case, the evidence is persuasive that Respondents Pasquale and Balicki continued to press forward with their investigation even after Person A had surrendered, understanding that while they had a suspect in custody, there was still evidence of the commission of the crime, as well as instrumentalities of the crime which had not yet been seized. It was reasonable of them to seek consent to enter [REDACTED] as that was a location in close physical proximity to the commission of the crimes and which location recently harbored one of the actors in those crimes. They pursued the investigation mindful that they had no authority to enter the apartment in the absence of Person B's consent or a search warrant. Respondent Pasquale candidly admitted that he understood his legal position clearly as he stood at the apartment door.

Based upon this set of circumstances, I find that Respondent Balicki's placement of his foot in the doorway to prevent the door from being closed effected a "protective sweep" even more limited than the one authorized in *Maryland v. Buie*. Moreover, Balicki's action was reasonable given the circumstances he faced. Respondents had every reason to suspect that the firearm used in the robberies was still inside the apartment in the control of parties unknown. Prudence, not paranoia, dictated that they take immediate steps to minimize their exposure to an unknown threat. While Person B had every right to refuse to grant consent to search the apartment, Respondents also had the right to ensure that they were not subjected to an inordinate risk of harm while they pursued their investigation.

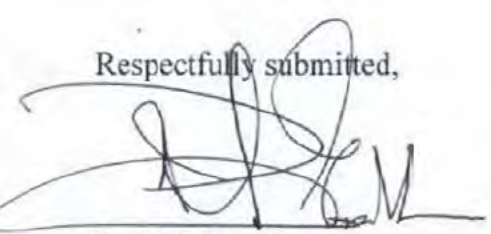
Based upon the foregoing, I find Respondent Balicki Not Guilty.

APPROVED

JUN 27 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER

Respectfully submitted,


Paul M. Gamble
Assistant Deputy Commissioner Trials